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ABSTRACT

Arguments for and against banning television commercials aimed at children under age 12, as well as the role of the Federal Trade Commission (FTC), the First Amendment, and parents in regulating such commercials, are explored in this paper. Following an introduction that describes the controversy, a second section of the paper details the arguments for restricting advertising, including the notion that children are too trusting of advertising messages and do not perceive a persuasive bias in ads. Subsections discuss whether the ads are unfair and deceptive, the FTC's role, and advertisers' response to self-regulation. A third section details arguments against ad restriction and cites childrens' First Amendment rights of exposure to ideas and the problems posed by restricting and defining commercial speech. The fourth section looks at the parents' role in regulating what their children watch and notes that a number of parents regularly discuss commercials with their children and help them understand that ads are for the purpose of persuading viewers to buy. The paper concludes that ads directed toward children not be restricted and argues for parental involvement in helping children evaluate and form opinions of ads. Extensive footnotes are included. (JC)

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REGULATION OF CHILDREN'S ADVERTISING- A THREE PARTY DISCUSSION: THE FTC, THE FIRST AMENDMENT, AND THE PARENTS

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I. INTRODUCTION

Since the introduction of television as a mass medium, educators, parents and others[1] have expressed concerns over the unknown effects of viewing on children. This concern has extended from the effects of violence[2] to the impact of children's commercials.[3] These potential problems are amplified by the long hours of television watching popular with children. In 1983 the average viewing hours for American children between the ages of two and five was 27 hours per week, while 6-11 year olds watched nearly 25 hours per week.[4] Approximately forty per cent of this viewing time was spent watching programs produced for adults.[5]

Concern over the effects of television advertising on children is not new. In one form or another these issues have been debated for over twenty years. (In 1961 the National Association of Broadcasters first adopted guidelines to regulate toy advertising to children on television.[6]) Some of the specific issues that have been raised by the Action for Children's Television and the Federal Trade Commission (FTC) include: Do television advertisements affect children's attitudes toward nutrition?[7] Do television advertisements encourage children to consume foods which cause tooth decay?[8] And, Are television advertisements unfair to young children?9

Even though the FTC's efforts to write a children's television advertising rule[10] were called off in 1981, it refused to

give television advertisements directed to children a clean bill of health, and said that they remained a legitimate cause for public concern.[11] And as long as there are concerned parents who question the effectiveness of industry self-regulation, children's advertising is likely to remain a controversial issue.[12]

But, even though the concern for children's well-being may indeed seem to justify regulation, in this case the legal implications of regulating an entire area of advertising to a specific group raises some prickly First Amendment issues. These were issues that had gone unaddressed by the FTC in its three-year examination that accumulated more than 60,000 pages of documents along with 6,000 pages of hearing transcript,[13] because, in the end, no rule had actually been proposed.[14] While there are areas of law where the First Amendment rights of children have been bypassed for their own welfare,[15] there is a real question whether a comprehensive ban on children's advertising would be legal without a definite showing of harm.[16] The U.S. Constitution sets up boundaries for statutes which may not be crossed, but in doing so it does not imply that everything being protected is socially desirable.[17] In some cases practices of questionable good must be allowed for the overall long term principle.[18]

This paper contends that while there are legitimate concerns over the effects of advertising to children, those concerns in themselves are not strong enough to outweigh the First Amendment rights that are involved. False and deceptive advertising is

rightly forbidden, but to comprehensively ban advertising to children is too drastic a cure for an ill that has not been conclusively diagnosed.

And it is not as if television advertising hits children without any modifying factors. Parents can play a major role[19] in influencing how their children perceive television and commercials, and this paper contends that parents also have rights in this area.[20] Parents should have the right to determine what is appropriate for their children's viewing and their consumer socialization. And indeed, it is the complex of moral rights and obligations that characterize the parent-child relationship that plays a role in shaping whatever fundamental rights children have.[21]

II. ARGUMENTS FOR A RESTRICTION OF ADVERTISING TO CHILDREN

A. Current Research on the Effects of Advertising to Children

Overall concern about the effects of television and its advertising is nothing new,[22] and while there has been a growing body of work[23] dealing with the specific issue of children and advertising, this area still lacks a large scale survey based on nationally representative probability samples.[24] Until answers are available from a source of that nature, the examination of the effects of advertising on children must be pieced together from a variety of sources.

When discussing this issue, "children" have typically been defined as individuals 12 years and under.[25] This definition is used by broadcasters, rating services, and many consumer groups.[26] The significance of twelve years as the cutoff age goes back to the idea of cognitive growth and the work of Jean Piaget, a psychologist who studied the mental growth processes in children. His proposed four main cognitive growth stages which roughly correlate with chronological age are:[27] sensori-motor (birth to two years), preoperational (two to seven years), concrete operational (seven to eleven years), and formal operational (eleven through adulthood). The stages that are focused on for this issue are the middle two.

That children can and do learn from television is well established,[28] but there doesn't seem to be a strong relationship

between light and heavy watchers and the degree to which they learn from commercials. There was no difference between heavy watchers (watched television daily) and light watchers (less than daily watching), ages 5-8, in their ideas about nutrition,[29] it had little relationship to their attitudes towards advertisements,[30] and more exposure to commercials did not result in increased spending or purchase requests by children.[31] Instead, one study showed that kindergarteners rely on personal in-store experiences as their principal information source about products.[32]

The FTC, after years of study on this topic, issued a 95-page final report[33] in 1981. It concluded that there was no effective rule the FTC could then develop,[34] but it reached the following conclusions regarding television advertising aimed at children six years old and under: (1) children place indiscriminate trust in televised advertising messages; (2) they do not understand the persuasive bias in television advertising; and (3) the techniques, focus, and themes used in child-oriented television advertising enhance the appeal of the advertising message and advertised product.[35]

But recent research casts new light on the issue.[36] In a 1986 study, eighty percent of the children ages 4-13 chose "They want to sell you something" as the main reason advertisements appear on television.[37] The girls in the sample chose this answer even more frequently than the boys. Another study's results showed that, apparently, young children can discriminate

between commercials and programs perceptually (knowing when a program is interrupted by a commercial), even though they may have difficulty conceptualizing the diferences.[38] In relation to this there has been the development of new techniques for exploring children's perceptions.[39] Non-verbal techniques have produced data which has forced the re-evaluation of "a whole series of assumptions about children's ability to cope with this medium."[40] This difference has been most pronounced among four-year-olds. These results indicate that television advertising aimed at children may not be as deceptive and unfair as previously thought,[41] that children can and do recognize advertising on television for what it is. One study reported that children as young as four-years-old can easily differentiate between commercials and television programs, can recognize the selling purpose of the commercials, and are even somewhat skeptical about them.[42]

B. Unfair and Deceptive Issues

In determining whether a practice is unfair or not the FTC considers three tests which were first articulated in a proposed trade rule regulating televised cigarette advertising[43] and later approved by the Supreme Court in FTC v. Sperry & Hutchinson Co.[44] They are:

> (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise--whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness;
> (2) whether it is immoral, oppressive, or unscrupulous;
> (3) whether it causes injury to consumers (or competitors or other businessmen).

While Sperry suggests that all three tests must be met before a practice would be declared unfair,[45] the Supreme Court has never held that all three criteria must be met.[46] (Some critics of children's advertising would say that point is irrelevant, since children's advertising does indeed meet all three criteria anyway--it offends public policy, is immoral, oppressive, and unscrupulous, and causes substantial injury to consumers and competitors.[47])

The Court has also said "... determination of whether an advertisement is misleading requires consideration of the ... sophistication of its audience."[48] And again, when advertising is directed at a particularly vulnerable or susceptible group of people, such as children, "its truthfulness must be measured by the impact it will make on them, not on others to whom it is not primarily directed."[49]

In spite of this seeming support for some kind of regulation, the FTC has continued to deal with the issue on a case by case basis. For example, In the Matter of ITT Continental Baking Co.,[50] the FTC found that the manufacturer of bakery products, such as "Wonder Bread" and "Hostess" snack cakes, had been misrepresenting the efficacy, nutritional content, and functional value of the product Advertisements for Wonder Bread depicted it as an extraordinary bread for producing dramatic and rapid growth in children. Other cases with similar rulings have included In re Mattel, Inc., 79 FTC 667 (1971), In re Topper Corp., 79 FTC 681 (1971), and In re Hudson Pharmaceutical Corp., 89 FTC 82 (1977).

One of the problems with declaring advertisements of certain products at certain times deceptive is that the same advertisement during other programs and at other times would not be.[51] And also, standards for what constitutes "exploitation" of "vulnerable" groups can be exceptionally elusive. Charges that an advertisement tends to take advantage of a vulnerable group raises controversial questions of excessive government paternalism.[52]

C. The FTC Role in Regulating Advertising to Children

The FTC's special solicitude for children has been in evidence since 1934, when the Supreme Court, in FTC v. R.F. Keppel & Bros., sustained a Commission order prohibiting the marketing of penny candy through a gambling device.[53] The Court found that the merchandising tactic in question exploited child consumers who could not protect themselves and was "of the sort which the common law and criminal statutes have long deemed contrary to public policy."[54]

It is the FTC's role to examine the content of advertisements.[55] It had been the Federal Communication Commission's role to regulate the quantity of advertising, but that has recently been changed by the Fowler Commission, so now the amount of television and radio commercialization is left to marketplace forces.[56]

Children's television activists (Action for Children's Television and the Council on Children, Media, and Merchandising) during the 1970's approached both the FCC[57] and the FTC[58] seeking some regulation of children's advertising. In a statement presented to the FTC during the public hearings on modern advertising practices, a spokesperson for ACT argued that:[59]

> Sophisticated advertising techniques are often used to deceive, cajole and exploit the youngest and least knowledgeable members of our society.... It is ACT's position that all product advertising directed to children is misleading and unfair.

In addition, they claimed that since bodies of decisional law in

the criminal, tort, and contract fields reveal a history of special protections for children, by analogy, similar protections should be extended in the context of children's advertising.[60]

Other proponents of regulation point to other countries which share American common law traditions and whose commercial broadcasting systems have banned television advertising to children.[61] (These countries include Australia, Cyprus, Finland, Great Britain, Hong Kong, Ireland, Malta, The Netherlands, and New Zealand.[62])

In an October 1977 interview, FTC Chairman Pertschuk suggested: "Television is a very, very powerful marketing tool. When it is directed toward children who cannot even read, it raises the question: Is it fair for advertisers to treat children as consumers? That's the question the Commission is now wrestling with."[63] In 1978 the FTC launched its hearings on children and television advertising. The Commission issued a Notice of Proposed Rulemaking[64] which sought comment of the issue of children's advertising. The rulemaking proceeding was based on a Staff Report which recommended the Commission consider three major alternatives:[65]

> (a) ban all televised advertising for any product which is directed to, or seen by, audiences composed of a significant proportion of children who are too young to understand the selling purpose of, or otherwise comprehend or evaluate, the advertising: (b) ban televised advertising directed to, or seen by, audiences composed of a significant proportion of older children for sugared food products, the consumption of which poses the most serious dental health risks; (c) require that televised advertising directed to, or seen by, audiences composed of a significant proportion of older

> children for sugared food products not included in paragraph (b) be balanced by nutritional and/or health disclosures funded by advertisers.

Over 60,000 pages of written comments and over 6,000 pages of hearing transcripts were collected.[56] And in 1981 the Staff issued its Final Report, recommending the FTC terminate the children's advertising rulemaking proceeding.[57]

In the three main areas of dispute the conclusions arrived at by the Staff were (1) the evidence "supports the conclusion" that children ages six and younger are essentially defenseless against advertising designed for children, but that an advertising ban--"the only effective remedy"--is impractical; (2) the evidence is "inconclusive" and neither proves nor disproves the contention that children's attitudes about nutrition are distorted by the large amounts of advertising for sugared food; and (3) that no scientific method exists for determining which sugared foods pose special dental health risks that should be disclosed in advertising.[58]

D. The Advertisers' Response to Regulation Threat--
The Move Towards Self-Regulation

A set of voluntary television advertising guidelines was originated in 1961 by the National Association of Broadcasters.[69] These regulations were continually updated, revised, and expanded to include all products advertised to children. For example, in 1974 at the time of the FC review of advertising regulations, in what was most likely an attempt to forestall official action,[70] the NAB Code was revised,[71] calling for among other things, a reduction of advertising on Saturday and Sunday children's programs to a maximum of ten minutes per hour, effective January 1, 1976. Prior to this, the amount of advertising per hour on children's programs was the same as the amount authorized for daytime shows directed to adults--sixteen minutes per hour.[72]

In 1974, the Children's Advertising Review Unit (CARU) was formed by the National Advertising Division of the Council of Better Business Bureaus.[73] The basic purpose of CARU was to review and evaluate advertising aimed at children twelve years old and younger. It set up guidelines in areas such as product presentations and claims (e.g. "Care should be taken not to exploit a child's imagination," "Copy, sound and visual presentations should not mislead children about product or performance characteristics"), sales pressure, disclosures and disclaimers, comparative claims, endorsements and promotion by program or editorial characters, premiums, and safety.[74] And CARU system-

atically reviews print, broadcast, and cable television advertising with those criteria in mind.

When CARU finds advertisements that are inaccurate, misleading, or inconsistent with the self-regulatory guidelines of the industry, CARU will seek changes through the voluntary cooperation of the advertisers. From 1983-1985 CARU handled 44 cases, including investigations of Hasbro Bradley, Inc. for The Transformers Action Figures, Tonka Corporation for GoBot Action Figures, and Coleco Industries for Cabbage Patch Kids Poseable Actionwear. In these three instances the basis of inquiry was on the product presentations and claims. The advertisers agreed to take the concerns into consideration in the future. The specific ads had already been discontinued for other reasons.[75]

Many advertisers now use pilot commercials to test the accuracy of children's perceptions as well as simply to test for recall.[76] Advertisers are anxious to keep the option of television advertising to children open, because, as one marketing director put it "... Children are buyers, if not immediately, then eventually. People tend to buy what they are used to and the best time to build brand indentification and brand loyalty is when consumers are young and developing their use habits."[77]

III. ARGUMENTS AGAINST THE RESTRICTION OF ADVERTISING TO CHILDREN

A. First Amendment Protection of Commercial Speech to Children.

That children do indeed have free speech rights was spelled out in Tinker v. Des Moines School District.[78] "In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views."[79] (It is interesting to note that in this case the Court made no distinction as to the strength of the rights asserted by the thirteen-year-old and the sixteen-year-old;[80] they were both treated as minors.) Also in Tinker, the Court quoted itself from Keyishian v. Board of Regents:[81] "The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues,(rather) than through any kind of authoritative selection.'"

It is seen there that the recognition that children are physically, emotionally, and mentally different from adults in many ways which lawmakers may justifiably recognize has proven no obstacle to the proper enforcement of their constitutional guarantees.[82] And indeed, First Amendment rights, even applied in the special circumstances of school, are available to students. When basic constitutional values are involved in a conflict, even in a school setting, the Court has shown itself willing to intervene.[83]

True, certain limits may constitutionally be set to guar-

antee proper growth, and beyond those limits expression may be curtailed,[94] but because commercial speech is protected speech, First Amendment concerns must be considered. As stated by the Court in 1982, "the State may not suppress exposure to ideas--for the sole purpose of suppressing exposure to those ideas--absent sufficiently compelling reasons."[95] This is not necessarily the situation with other laws involving children, such as child labor laws or obscenity issues.[96]

The Supreme Court recognized that the spread of commercial information plays an important role for the American public in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council. When speaking to the issue of misleading or deceptive commercial speech, the Court said, "The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely."[97]

And indeed, one instrumental function that free speech plays in the child's development is that of offering occasions for practice in the skills of rational discourse, the weighing of evidence, persuasion, etc.[98] The Court speaks of the role of the First Amendment in "... affording the public access to discussion, debate, and the dissemination of information and ideas."[99]

When the Court has reviewed regulations inhibiting the presentation of commercial speech, it has departed from the clear and present danger test in favor of a less speech-protective form of balancing, which weighs the state's interests in regulation

against the infringement of First Amendment rights that regulation would produce. The state interest must be "substantial."[90] This mid-level legal standard seems to have four parts as set out by the Court in it Central Hudson Gas and Electric Corp. v. Public Service Commission decision.[91] These include the requirements that the restriction must directly advance the state interest asserted and the restriction must be narrowly tailored to avoid being overbroad.

Thus, any regulation the FTC might fashion would have to be a narrowly tailored one, a difficult feat with an area as broad as commercial speech. For if the techniques are not outlined specifically enough, the regulation could be subject to an overbreadth attack under the First Amendment.[92]

In a case forbidding the sale of adult materials containing language that would tend to corrupt the morals of youth, a unanimous Court struck down a Michigan statute which would "... reduce the adult population of Michigan to reading only what is fit for children."[93]

As Justice Powell said, in a concurring opinion in FCC v. Pacifica Foundation, a case initiated by the complaint of a father who heard George Carlin's "Filthy Words" monologue on the radio one afternoon while driving with his son:[94]

> I would place the responsibility and the right to weed worthless communications from the public airwaves where it belongs ... in a public free to choose those communcations worthy of its attention from a marketplace unsullied by the censor's hand.

As unwilling as the Court has been to define commercial speech in general,[95] it seems that in the special case of advertising to children the First Amendment rights of the children to receive and be exposed to information will also be protected. They, as a group, will be protected from the same unfair and deceptive advertising as adults. Additional regulation would be of questionable validity, since current research has been unable to define deceptive advertising to children, which is often dependent on their individual cognitive growth. Therefore, it is best left untouched by the regulator's hand.

IV. THE PARENT'S RIGHT TO REGULATE WHAT THEIR CHILDREN SEE

It is the contention of this paper that, having weighed both sides of the argument, ultimately the decision of what children should or should not watch on television is most appropriately left up to their parents. The remainder of this paper will be spent examining this perspective.

In 1925, in Pierce v. Society of Sisters,[96] the Court held that parents had the right to send their children to private rather than public schools, because they might wish to shelter their children from the standardization that results from instruction by public school teachers. "It is not seriously debateable that the parental right to guide one's child intellectually and religiously is a most substantial part of the liberty and freedom of the parent."[97]

In Wisconsin v. Yoder[98] the free exercise clause permitted Amish parents to withdraw their teenage children from public schools, where they might be exposed to "...worldly influences in terms of attitudes, goals, and values contrary to their beliefs."[99] The Court said:[99]

> The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.

And also, "... even this paramount responsibility (for the State to educate its citizens) was, in Pierce, made to yield to the right of parents to provide an equivalent education in a pri-

vately operated system."[100]

Both Pierce and Wisconsin focused on conflicts between parental rights and state rights, and in both cases the Court's support came down on the side of the parents.

It is the parents who are most familiar with the effects a decision might have on their child. They are also the best informed to understand the motives behind a child's wishes.[101] They are also in the best position to judge what kinds of intellectual activities are appropriate for their child's state of development.[102] This perspective seems to have been supported by the Court in Ginsberg v. State of New York.[103] A state statute involved forbade minors under seventeen from purchasing obscene materials, but permitted parents to give them to their own children, and the decision upheld the rights in the statute.

Specifically looking at children's advertising, the data indicates that parents can have a substantial impact on young children's understanding of commercials by talking with them about the advertisements and about the products the children request. It seems to help in the development of a "cognitive filter", the ability to mentally sift information through a screen of reality. The child can learn that these scenarios are for the purpose of selling, and that one doesn't need to have everything one sees.

In one study, the top three variables in explaining kindergarteners' level of understanding of commercials were these kinds of mother-child interaction variables--discussing purchase

requests with children, not yielding to children's purchase requests, and talking about commercials with children.[104]

Mothers seem to sense the importance of this role, because in that same study three-fifths of all mothers reported that they talk to their children about commercials.[105] When comparing mothers from three socio-economic status levels it was seen that high-status mothers reported more frequent discussions than either middle-status or low-status mothers. However, 85 percent of their comments to their children were negative about the commercials.[106]

In an attempt to determine how widespread the concern about children's advertising is, another study surveyed mothers to get their opinion on banning commercials on Saturday morning television.[107] Fifty-three percent of the mothers were opposed to banning commercials on Saturday morning television, 28 percent favored a ban, and 19 percent were unsure. So while it may be safe to assume there is a nucleus of highly concerned parents, it is questionable how truly widespread that parental concern is. If parents are indeed indifferent to the advertising, will they be willing to play a role in mediating the effects of advertising? Research has not been able to answer this question,[108] and so at this point it remains mere speculation.

An interest in consumer socialization may be one reason more parents are not actively opposed to children's advertising. This term refers to the development of a wide range of knowledge, attitudes, and skills which are related to consumption.[109]

Examples of this would include knowledge of the purpose of commercials, attitudes towards commercials, and some knowledge of brands and products.[110] This consumer socialization concept is perhaps best understood in terms of the child's developing abilities to evaluate, select, and use information relevant to purchasing.[111]

One study among adolescents indicated they acquired consumer learning from their exposure to television advertising. Their consumption behavior, however, was found to be a social process involving overt communication with others, often their parents, rather than an individual psychological process triggered by advertising.[112] This consumer learning and consumption behavior becomes important as young children become shoppers themselves. Even as far back as 1964, a few five-year-old shoppers were revealed in one study, while all of the seven-year-olds and nine-year-olds reported shopping independently and with friends.[113] This reported phenomenon is bound to be even more prevalent these days with single parent households and homes where both parents work.

Socialization research points to the family as being a more important influence on consumer socialization than television advertising.[114] And in many cases, family members--particularly parents--may mediate the ultimate impact of commercials, turning a criticized medium into a learning tool.

V. CONCLUSION

Consumption for children is as legitimate an activity as it is an unavoidable one. And multiple influences on product preferences and purchasing are an inevitable part of childhood. The banning of television advertising for children would not stop marketing activities directed at children, and instead would act to discriminate against smaller and weaker competitors who didn't have the varied marketing options at their disposal.[115] That the state has a compelling interest in the early development of its future citizens by no means gives it the right to control their input and output of ideas according to its conception of the most desirable pattern.[116] As the Court put it, "... limiting the field of human knowledge can serve the public welfare or add substantially to the security of life, liberty or the pursuit of happiness is inconceivable."[117]

The child's ultimate selection of ideas and values will be made from the variety offered for inspection at an early age, so it is difficult to predict the effect that a present ban on some form of expression will have on the child's future evaluation of options.[118]

In summing up the argument for parental involvement in the children's advertising issue, rather that some sort of ban, there is a saying that goes: "If one is going to live by the ocean, it is wiser to teach your children to swim, than to try to build a fence around the sea."[119]

FOOTNOTES

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